Supreme Court, U.S.
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No. 99-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

WORTHINGTON CORPORATION,
Petitioner,

v.

ELAINE RONSINI,
EXECUTRIX OF THE ESTATE OF FRANK RONSINI,
Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF FOR BELL HELICOPTER TEXTRON INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR BELL HELICOPTER TEXTRON, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Bell Helicopter Textron, Inc. ("Bell") is a manufacturer of helicopters used in military and civil aviation. Bell's military helicopters have been used by the Nation's Armed Forces for

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[1]Written consents to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that the brief was not authored in whole or part by counsel for a party and further states that no entity other than *amicus* and its insurer (the United States Aircraft Insurance Group, managed by United States Aviation Underwriters, Inc.) made a monetary contribution to the preparation and submission of this brief.

over half a century. Bell's OH-13 medical evacuation helicopters rescued over 25,000 soldiers during the Korean War. Bell-manufactured helicopters, including the UH-1 "Huey" and the AH-1 "Cobra," were employed extensively during the Vietnam War. Bell continues to manufacture advanced helicopters for the U.S. military, such as the TH-67 training helicopter, the AH-1W "Super Cobra," and the OH-58D "Kiowa Warrior." Moreover, the Bell Boeing V-22 "Osprey" tilt-rotor aircraft is now being manufactured and delivered to the military.

This case is of concern to Bell because it faces liability claims when the helicopters that it manufactured for the military are involved in accidents. Such claims arise not just out of accidents involving aircraft in military service, but also out of accidents involving aircraft that have been sold by the Government as surplus into the civil aviation market. While the resulting suits typically raise claims for alleged defects in the helicopter's design, they often also include claims that Bell allegedly failed to provide adequate warnings about the potential hazards in flying its military aircraft as designed.

Even though the military maintains strict control of the contents of aircraft flight and maintenance manuals, including post-manufacture bulletins to operators, Bell has had mixed success in defending failure-to-warn claims on the basis of the government contractor defense established in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). This is because some lower courts, like the New York courts in this case, have adopted versions of the government contractor defense for failure-to-warn claims that are difficult, if not impossible, to satisfy. The result is that plaintiffs are able to evade the *Boyle* defense by pleading their claims as ones for failure to warn rather than for design defect.

As demonstrated in the petition for certiorari, there is a conflict among the decisions of the circuits and other lower courts on how the *Boyle* defense should be applied to failure-to-warn claims. The uncertainty regarding the applicable standard increases Bell's costs in evaluating and defending against such claims. It would therefore be of great benefit to Bell if there were a uniform standard governing the applicability of the government contractor defense to failure-to-warn claims — particularly if that standard provided protection for failure-to-warn claims that is equivalent to that provided by *Boyle* for design defect claims.

For these reasons, Bell files this *amicus* brief urging the Court to grant the petition for certiorari.

ARGUMENT

Introduction and Summary

The petition for Worthington Corporation raises an important question of federal law with which this Court has not squarely dealt: How should the government contractor defense established in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), be applied to claims for failure to warn against government contractors? *Boyle* itself dealt with claims that the escape hatch on a helicopter manufactured by Sikorsky for the Marines was defectively designed.[2] *Id.* at 503.

While not directly dealt with in *Boyle*, the question of how the government contractor defense should be applied to failure-

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[2]*Boyle* ruled that design defect claims against a government contractor are precluded "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512.

to-warn claims is of critical importance to contractors who manufacture aircraft and other equipment for the Government.[3] This is because, in many cases, claims for alleged design defects can plausibly be reformulated as claims for failure to warn. That is, plaintiffs can claim that they were not adequately warned of the dangers posed by the allegedly defective design.[4] Unless the government contractor defense established by *Boyle* provides meaningful protection against such failure-to-warn claims, the shield against tort liability furnished by *Boyle* to government contractors can be circumvented simply by pleading the claim as one for failure to warn.

The petition for certiorari convincingly demonstrates that there is disarray among the circuits on how the *Boyle* defense is to be applied to failure-to-warn claims. Bell in this brief as an *amicus* in support of the petition demonstrates that there are two additional factors supporting certiorari. First, the correctness of the construction of *Boyle* employed by the New York courts in this case is a matter of general importance, for that construction will adversely affect government suppliers, including aircraft manufacturers, in cases where exposure to asbestos is not even remotely an issue. Second, the rationale relied upon by the Appellate Division is in conflict with *Boyle*, for it resurrects, in a failure-to-warn context, a version of the government

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[3]There are, of course, three basic kinds of product liability claims: (1) design defect claims, (2) manufacturing defect claims, and (3) failure-to-warn claims. See generally *Restatement (Third) of Torts: Product Liability* § 2 (1998). For a discussion on the applicability of *Boyle* to manufacturing defect claims, see *Bailey* v. *McDonnell Douglas Corp.*, 989 F.2d 794, 800-02 (5th Cir. 1993).

[4]See, *e.g.*, *Butler* v. *Ingalls Shipbuilding, Inc.*, 89 F.3d 582, 586 (9th Cir. 1996)(holding that government contractor defense bars design defect claim, but remanding for determination on whether "specifications of Ingalls' contract with the Navy conflicted with Ingalls' duty to warn under state law.").

contractor defense that was explicitly rejected in *Boyle* for design defect claims.

A. The Certiorari Petition Raises an Issue of General Importance Beyond the Context of Asbestos Litigation.

The petition arises in the context of the asbestos litigation. The burdens imposed on courts and litigants by the "elephantine mass of asbestos cases" are familiar to this Court. *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295, 2302-03 (1999); see *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 597-98 (1997). While this case may arise in the context of the asbestos litigation, the issue raised is one of general importance to government contractors.

The evidence at trial in this case demonstrated that the Navy during World War II specified that asbestos-containing gaskets be used on the pumps supplied by Petitioner. Pet. App. 50a-54a, 58a.[5] The Navy, moreover, controlled the content of those service manuals where warnings regarding the dangers of inhaling asbestos might have logically been placed. Pet. App. 55a-59a, 61a-62a. Nonetheless, the Appellate Division affirmed on the ground that there was an "absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning . . ." Pet. App. 3a.

Under this government "prescription or proscription" interpretation of the government contractor defense, the defense applies to failure-to-warn claims only if (a) the Government itself expressly prescribed the warnings to be given or (b) the Government forbade the manufacturer from providing any

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[5]Citations to "Pet. App." are to the Appendix accompanying the Petition.

additional warnings to its personnel. That is an extraordinarily difficult standard to satisfy, particularly when the events in question occurred decades ago.

This standard for applying the government contractor defense to failure-to-warn claims, moreover, makes it easy for plaintiffs to avoid *Boyle* even though the Government approved the product's design. All plaintiffs need do is plead their case as one for failure to warn in the hope that there is no evidence that the United States, although aware of the dangers, either prescribed a specific warning or proscribed the furnishing of other warnings.

Suppliers of aircraft to the Government, including Bell, have also lost court decisions that constrict the application of the government contractor defense to failure-to-warn claims. In *Snell* v. *Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997), for instance, the Ninth Circuit remanded a failure-to-warn claim in a military accident case on the ground, *inter alia*, that Bell had not shown that government specifications "constrain[ed] Bell's ability to comply with whatever duty to warn it may have had." *Id.* at 749. Accord *Timberline Air Service, Inc.* v. *Bell Helicopter Textron, Inc.*, 125 Wash. 2d 305, 326, 884 P.2d 920, 931 (1994)(government contractor defense applies to failure-to-warn claim "only if there are precise government specifications pertaining to warnings").

Unless there is some written documentation demonstrating express government prescription or proscription regarding warnings, it can be extraordinarily difficult to demonstrate, often years after the fact, that the Government dictated the precise contents of any warning to be given or explicitly precluded the furnishing of other warnings. Memories fade, and witnesses disappear or die.

In any event, as Petitioner has demonstrated in this case with respect to its pumps, the reality is that the military carefully

reviews and ultimately controls the content, including revisions thereto, of the operating and maintenance manuals for aircraft used by its personnel.[6] Only warnings approved by the military are circulated to its personnel. In Bell's experience, the military, for reasons of its own, has even declined to pass on to military personnel alert bulletins that Bell has sent to operators of civilian aircraft that are similar in design to military models. Thus, even in the absence of a distinct record showing a government decision on whether and how to warn about a specific hazard, there must have been a decision, implicit or explicit, by the government personnel on whether and how to warn military personnel about any hazards as to which government personnel were knowledgeable.

In recognition of this reality, other lower courts have (correctly Bell believes) rejected the contention that aircraft manufacturers may invoke the government contractor defense on failure-to-warn claims only if they "propose[d] actual warnings concerning every potential problem with a specific design feature" and show that "such proposed warnings" were

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[6]See, *e.g.*, *Tate* v. *Boeing Helicopters*, 140 F.3d 654, 658 (6th Cir. 1998)("*Tate II*")("[T]he Army's review of the CH-47D Operator's Manual was extensive."); *In re Aircraft Crash Litigation Frederick, Md.*, 752 F. Supp. 1326, 1366 (S.D. Ohio 1990) ("It is clear to this Court that the Air Force tightly controlled the content of the flight manuals . . . ."), *aff'd mem. sub nom. Darling* v. *Boeing Co.*, 935 F.2d 269 (6th Cir. 1991)(table); *Nicholson* v. *United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988)("The government maintained control over the contents of the manual and made revisions to the contents without the consultation or knowledge of UTC."); *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 784, 660 A.2d 810, 836 (1995)("The government specified the contents of the manuals and, therefore, controlled the content of any warnings.").

rejected by the military.[7] Those cases have applied the three-pronged *Boyle* test either directly, or with slight modification, to failure-to-warn claims. See Petition 16-17 (citing *Emory* v. *McDonnell Douglas Corp.*, 148 F.3d 347, 352 (4th Cir. 1998) (following *Boyle*); *Smith* v. *Xerox Corp.*, 866 F.2d 135, 137 (5th Cir. 1989)(following *Boyle*); *Tate* v. *Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995)("*Tate I*")(adopting modified *Boyle* test)[8]; *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 1003-04 (7th Cir. 1996)(following *Tate I*), *cert. denied*, 520 U.S. 1116 (1997)).

Aircraft manufacturers need to know what is the standard for determining when the government contractor defense precludes failure-to-warn claims. Is the standard that applied by the courts below: namely, whether the Government expressly prescribed the warnings to be used or proscribed the furnishing of any additional warnings? Or is it sufficient, as other courts have held, that the Government be "both knowledgeable and concerned about the contents of the proposed warnings before granting its approval"? *Tate II*, 140 F.3d at 658. Knowing the answer to these questions is critical to government contractors, not only in evaluating potential liability in individual cases, but

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[7] *Tate* v. *Boeing Helicopters*, 921 F. Supp. 1562, 1566 (W.D. Ky. 1996), *aff'd*, 140 F.3d 654 (6th Cir. 1998).

[8] The Sixth Circuit held in *Tate I*:

> "When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the Untied States of the dangers in the equipment's use about which the contractor knew, but the United States did not." 55 F.3d at 1157.

also in evaluating future liability for the purpose of estimating likely costs when bidding for new contracts. And, as the Court recognized in *Boyle*, the answer to this question is also important to the Government, for, in the long run, contractors will pass their costs on to the Government.[9]

In sum, the importance of the issue raised in this case goes far beyond specific context of the asbestos litigation and has general applicability to failure-to-warn claims against government contractors, including those manufacturers supplying advanced aircraft to the Nation's military.

B. The Decision Below Employed a Test for Invoking the Government Contractor Defense That Was Explicitly Rejected by the Court in *Boyle*.

One ground for granting certiorari is that a lower court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). While *Boyle* did not directly involve failure-to-warn claims, the decision below has adopted a version of the government contractor defense for failure-to-warn claims that the Court expressly rejected in *Boyle* for design defect claims.

1. In *Boyle*, the Court considered, and rejected, a formulation of the government contractor defense that had been adopted by the Eleventh Circuit in *Shaw* v. *Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988). Under that formulation, the defense

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[9]The Court reasoned as follows in *Boyle*: "The imposition of liability on Government contractors will directly affect the terms of Government contracts; either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." 487 U.S. at 507.

> "would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design." *Boyle*, 487 U.S. at 513 (italics in original).

While recognizing that this "formulation may represent a perfectly reasonably tort rule," this Court ruled that it was not "designed to protect the federal interest embodied in the 'discretionary function' exemption" to the Federal Torts Claims Act.[10] *Id.* The Court reasoned:

> "The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." *Id.*

2. The government "prescription or proscription" test that the courts below employed in this case is the direct analogue for failure-to-warn claims of the *Shaw* formulation that the Court rejected for design defect claims. The "prescription" prong (that the Government has dictated the warning) is the equivalent of the *Shaw* requirement that contractor not have participated in the product's design. The "proscription" prong (that the Government has precluded additional warnings by the contractor) is the equivalent of the *Shaw* requirement that the

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[10]The "discretionary function" exemption to the Federal Torts Claims Act is codified at 28 U.S.C. § 2680(a).

contractor have provided alternative designs that the Government rejected.

As was true with the *Shaw* test for design defect claims, the "prescription or proscription" test for failure-to-warn claims fails to protect the federal interests embodied in the discretionary function exemption to the Federal Torts Claims Act. "The basis for the discretionary function exception was Congress' desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Berkovitz* v. *United States*, 486 U.S. 531, 536-37 (1988)(quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)). There is obviously discretion involved in determining whether and how to warn sailors in wartime (such as Mr. Ronsini) about the potential long-term effects of their exposure to asbestos or other toxic substances. The Courts of Appeals have ruled that claims that the Government failed to provide adequate warnings to military, or former military, personnel about possible dangers from their exposure during military service to toxic substances fall under the discretionary function exemption.[11] Moreover, with particular reference to

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[11]See, *e.g.*, *Minns* v. *United States*, 155 F.3d 445, 452 (4th Cir. 1998) ("[T]he decision whether to warn soldiers and their families of the potential effects of inoculations and pesticides [during the Gulf War] . . . amounted to a judgment call."), *cert. denied*, 525 U.S. 1106 (1999); *Maas* v. *United States*, 94 F.3d 291, 297 (7th Cir. 1996)("Deciding whether health risks [from radiation exposure during operation to recover nuclear weapon] justify the cost of a notification program, and balancing the cost and the effectiveness of a type of warning, are discretionary decisions . . . ."); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 997 (9th Cir. 1987)("[A]ny decision whether to issue warnings to thousands of test participants [in nuclear weapons tests] of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of

(continued...)

asbestos, the Courts of Appeals have also ruled that (a) the Government's decision to use asbestos in merchant marine ships during World War II without establishing a safety program for sailors[12] and (b) the Government's decision to sell surplus asbestos "as is" without providing any additional warnings each fall within the discretionary function exemption.[13]

In *Boyle*, the Court reasoned:

> "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." 487 U.S. at 512.

The same conclusion applies to failure-to-warn claims. It makes little sense to hold the Government's contractor liable for lack of adequate warning (a) when a direct suit for failure-to-warn against the Government would be precluded by the discretionary function exemption, (b) when the Government controlled the content of the manuals accompanying the product, and (c) when the Government was as knowledgeable as the manufacturer about the product's hazards. Moreover, it makes little sense to adopt a standard for applying the government contractor defense to failure-to-warn claims that

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[11](...continued)
government."), *cert. denied*, 485 U.S. 905 (1988); *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 194, 201 (2d Cir. 1987)("The very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion.")

[12]*Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96 (5th Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

[13]*Lively* v. *United States*, 870 F.2d 296 (5th Cir. 1989); *Smith* v. *Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986).

allows *Boyle* to be avoided simply by pleading the case as one for failure to warn rather than as one for design defect.

In short, there is a fundamental conflict in the rationale employed by the New York courts in this case in restricting the government contractor defense as applied to failure-to-warn claims and the rationale employed by the Court in *Boyle* in adopting that defense for design-defect claims. The standard applied in this case fails to focus, as *Boyle* requires, on whether the Government exercised discretion in reviewing and approving the warnings accompanying the equipment.

This conflict provides an additional reason on why this Court's review is needed. The Court should grant review and adopt a standard for failure-to-warn claims, such as that formulated by the Sixth Circuit (*Tate I*, 55 F.3d at 1157), that places application of the government contractor defense for failure-to-warn claims on the same analytical footing on which *Boyle* rested application of that defense for design defect claims.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, certiorari should be granted to review the judgment in

this case of the Appellate Division of the New York Supreme Court.

Respectfully submitted,

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